91-2003

No.

FILED
JUN 12 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in invoking the federal cause of action for money had and received (*indebitatus assumpsit*) to recover state taxes unlawfully collected from a federal contractor, the United States must comply with the state-law requirements (i) that an administrative tax refund claim be filed as a precondition to suit for refund (Cal. Rev. & Tax. Code § 6932 (West 1987)) and (ii) that suit for refund be commenced within 90 days of the administrative denial of the refund claim (Cal. Rev. & Tax. Code § 6933 (West 1987)).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	15
Appendix A	1a
Appendix B	16a
Appendix C	24a
Appendix D	25a
Appendix E	26a

TABLE OF AUTHORITIES

Cases:

Bayne v. *United States*, 93 U.S. 642 (1877)	9, 11
Bend v. *Hoyt*, 38 U.S. (13 Pet.) 263 (1839)	9
Board of County Commr's v. *United States*, 308 U.S. 343 (1939)	10, 11, 13, 15
City of New Orleans v. *United States*, 371 F.2d 21 (5th Cir.), cert. denied, 387 U.S. 944	8, 10, 11, 12, 14
City of Philadelphia v. *Collector*, 72 U.S. (5 Wall.) 720 (1866)	9
Dooley v. *United States*, 182 U.S. 222 (1901)	9
Elliott v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836)	9
Gaines v. *Miller*, 111 U.S. 395 (1884)	9
Galante v. *Commodity Credit Corp.*, 71 F. Supp. 963 (S.D. Cal. 1947)	9
Moses v. *Macpherlan*, 2 Burr. 1005, 96 Eng. Rep. 120 (K.B. 1759)	9
State Board of Equalization v. *Superior Court*, 111 Cal. App. 3d 568 (1980)	13

Cases—Continued: Page

United States v. *Anderson County*:
705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983) 15
761 F.2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985) 14
United States v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377 (1841) 9
United States v. *Broward County*, 901 F.2d 1005 (11th Cir. 1990) 7, 8, 11
United States v. *California*, 655 F.2d 914 (9th Cir. 1980) 6
United States v. *City of Manassas*, 830 F.2d 530 (4th Cir. 1987), aff'd, 485 U.S. 1017 (1988) 15
United States v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981) 15
United States v. *Compagnie Generale Transatlantique*, 26 F.2d 195 (2d Cir. 1928) 9
United States v. *DeKalb County*, 729 F.2d 738 (11th Cir. 1984) 8, 11, 13
United States v. *District of Columbia*, 669 F.2d 738 (D.C. Cir. 1981) 8, 11
United States v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301 (1960) 10
United States v. *Michigan*, 851 F.2d 803 (6th Cir. 1988) 8, 11, 12
United States v. *New Mexico*, 455 U.S. 720 (1982) 15
United States v. *Summerlin*, 310 U.S. 414 (1940) .. 10-11
United States v. *Washington*, 654 F.2d 570 (9th Cir. 1981), rev'd, 460 U.S. 536 (1983) 15
United States v. *Wurts*, 303 U.S. 414 (1938) 9

Constitution and statutes:

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) 12
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 *et seq.* 3
Pickett Act of 1910, ch. 421, § 1, 36 Stat. 847, 43 U.S. 141 3

Statutes—Continued: Page

10 U.S.C. 7420-7438 3
28 U.S.C. 2415(a) 2, 11
42 U.S.C. 7156 3
Cal. Rev. & Tax. Code (West 1987):
§ 6384 ..... 4, 5
§ 6902 ..... 4, 5
§ 6932 ..... 2, 13
§ 6933 ..... 2, 4, 5, 10

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 932 F.2d 1346. The opinion of the district court (App., *infra*, 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a) was entered on May 16, 1991. A timely petition for rehearing with a suggestion of rehearing en banc was denied on March 18, 1992 (App., *infra*,

24a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2415(a) provides, in relevant part:

> * * * [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

2. Cal. Rev. & Tax. Code § 6932 (West 1987) provides, in relevant part:

> No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed * * *.

3. Cal. Rev. & Tax. Code § 6933 (West 1987) provides, in relevant part:

> Within 90 days after the mailing of the [Equalization Board's] action upon a [refund] claim * * *, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

STATEMENT

1. During the period from 1975 to 1981, the United States Department of Energy and the United States Department of the Navy contracted with Williams Brothers Engineering Company (WBEC) to manage oil drilling operations being conducted at Naval Petroleum Reserve No. 1 in California (App., *infra*, 2a).[1] Under the contracts with WBEC, the United States agreed to pay a management fee and to reimburse WBEC for various types of costs—including specifically any sales or use taxes—that WBEC incurred in managing the federal property. WBEC was prohibited from performing any construction work on federal property under the contracts; instead, all construction work was to be performed either by the United States or by subcontractors (*id.* at 16a; CR 27, Attachments 2, 3; CR 28 at 4-9).[2]

Pursuant to these contracts, WBEC procured goods and services required for operation of the Naval Petroleum Reserve (App., *infra*, 2a; CR 28 at 3). Title to items of personal property purchased for use at the Reserve passed directly to the United States at the time of purchase. This property was either stored as inventory at the Reserve or was used by govern-

---

[1] The Naval Petroleum Reserve was established pursuant to Section 1 of the Pickett Act of 1910, ch. 421, 36 Stat. 847 (43 U.S.C. 141), which was repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (43 U.S.C. 1701 *et seq.*). Authority to administer NPR-1 is conferred on the Department of the Navy (10 U.S.C. 7420-7438) and the Department of Energy (42 U.S.C. 7156).

[2] "CR" references are to the docket control numbers assigned to documents in the original record by the Clerk of the district court and transmitted to the court of appeals.

ment personnel or by subcontractors in conducting oil field operations (App., *infra*, 2a; CR 27 at 6 & Attachments 2 (§ VIII, ¶¶ (b) and (c)), 3 (¶ 7(a)); CR 28 at 4)).

2. During the years 1975 through 1981, the State of California assessed sales and use taxes in the amount of $14,136,853 for WBEC's purchases of personal property for use at the Naval Petroleum Reserve (App., *infra*, 16a). The assessments were made pursuant to Section 6384 of the California Revenue and Taxation Code (hereafter the California Code), which taxes sales of personal property to federal contractors "for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State." Cal. Rev. & Tax. Code § 6384 (West 1987). WBEC paid the State's assessments under protest, with funds provided by the United States pursuant to the federal contracts (App., *infra*, 2a).

WBEC thereafter filed timely administrative refund claims with the California Board of Equalization pursuant to Section 6902 of the California Code (App., *infra*, 2a, 18a-19a). The basis for the refund claims was that, under its contracts with the United States, WBEC did not use the property it purchased for "the construction of improvements" and that its purchases were therefore outside the scope of the State's tax provision (*id.* at 2a). When the administrative refund claims were disallowed, WBEC commenced an action in state court for refund of taxes pursuant to Section 6933 of the California Code (App., *infra*, 2a). The United States was not joined as a party to that action.

During the pendency of the state court proceedings, the State conceded that approximately $3 million of

its assessments were invalid because the property involved had been used or installed by government personnel (App., *infra*, 2a). The State therefore agreed to refund that portion of the taxes it had collected. The State continued to maintain, however, that the remaining $11 million it had assessed and collected—for personal property purchased by WBEC but installed by other contractors—was authorized under state law (*ibid.*).

By agreement of the parties, WBEC dismissed its state court action without prejudice. The validity of the remaining $11 million of the State's assessment, and of the claim for refund of that amount, was thus left unresolved (App., *infra*, 2a).

3. The United States then filed this action in federal district court seeking: (i) a declaration that the California tax was inapplicable to WBEC's purchases of personal property because WBEC was not engaged in the "construction of improvements" as required by Section 6384 of the California Code; and (ii) a judgment for damages against the State in the amount of $11 million, plus interest, for money had and received under the State's invalid tax assessment (App., *infra*, 2a-3a).

The district court granted summary judgment to the State. The court first concluded that the United States had no right to recover the taxes under state law because the government had not made a timely administrative refund request (as required by Section 6902 of the California Code) and had not commenced this action within 90 days of the denial of the administrative refund claim filed by WBEC (as required by Section 6933 of the California Code). The court concluded that compliance with these state procedures was "a condition precedent" to the State's liability in a statutory refund suit (App., *infra*, 17a (quoting

United States v. *California*, 655 F.2d 914, 918-919 (9th Cir. 1980)). In the court's view, compliance with these procedures was an "element of [the plaintiff's] cause of action" (*ibid.* (quoting *United States* v. *California*, 655 F.2d at 918-919)). Since the United States had not complied with those procedures, the court concluded that the United States could not obtain recovery under the State's refund statute (App., *infra*, 19a-20a & n.3).

The district court further concluded that the United States was not entitled to seek recovery of taxes from the State under the quasi-contractual common law action of money had and received (*indebitatus assumpsit*). The court stated that an action in quasi-contract cannot "be stretched to include state taxes [paid] under a disputed state statute" (App., *infra*, 21a). The court found no "unjust enrichment" of the State, even if the taxes were wrongfully collected, because there was no "unjustness in the State procedures" available for challenging the assessment (*id.* at 23a).

4. The court of appeals affirmed (App., *infra*, 1a-15a). The court acknowledged that numerous decisions have held that the United States "may maintain a quasi-contract action independent of state law" for recovery of state-imposed taxes, but the court stated that those cases "involved classic cases of unjust enrichment" (*id.* at 9a). The court concluded that "[t]his case does not involve classic unjust enrichment such as simple overpayment," but instead is based upon "a state-created exemption from a state created sales tax" (*ibid.*). The court held that any right of recovery, in this situation, was subject to compliance with state administrative procedures for refund claims and with the state-law requirement

that an action for refund be commenced within 90 days of administrative denial of the refund claim (*id.* at 9a-10a, 12a). Since the United States had not complied with those state-law procedures, the court concluded that the State's retention of the allegedly invalid tax did not represent an instance of "classic unjust enrichment" (*id.* at 14a).

In so ruling, the court acknowledged (App., *infra*, 12a-14a) that the recent decision of the Eleventh Circuit in *United States* v. *Broward County*, 901 F.2d 1005 (1990), had reached the opposite conclusion on indistinguishable facts. In *Broward County*, the court of appeals concluded that the United States was entitled to recover invalid state taxes assessed against a federal contractor under the "federal common law cause of action in quasi-contract for money had and received" and that "the state statute [imposing a 60-day claim filing deadline] has no application to [that] action" (App., *infra*, 13a (quoting *United States* v. *Broward County*, 901 F.2d at 1008-1009)). The Ninth Circuit stated that it disagreed with the Eleventh Circuit's decision in *Broward County* because "there was no unjust enrichment in * * * *Broward County*, and there is none in the case at bar" (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

The decision in this case departs from the established rulings of this Court that authorize the United States—without regard to conflicting state-law procedures or remedies—to invoke the common law action of "money had and received" to recover money belonging to the United States that has been unlawfully obtained by the States or other parties. As the court of appeals recognized (App., *infra*, 12a-14a), its holding that the United States may not invoke

federal law to recover unlawfully exacted state taxes unless the United States has complied with state-law procedures applicable to state tax refund claims conflicts with *United States* v. *Broward County*, 901 F.2d 1005 (11th Cir. 1990). The decision also conflicts with decisions of several other courts of appeals. See *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *United States* v. *DeKalb County*, 729 F.2d 738, 740 (11th Cir. 1984); *United States* v. *District of Columbia*, 669 F.2d 738, 741-742 (D.C. Cir. 1981); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967).

This case involves the standard federal services contract used by the Department of Energy and other federal agencies for the private management of federal facilities. Many tax controversies with local taxing authorities throughout the United States have been generated under this standard services contract. As in the present case, these controversies often involve substantial sums of money. By departing from the previously uniform authority that permits the United States to pursue the common law action for money had and received without complying with state-law refund procedures, the decision in this case creates a conflict among the circuits on a recurring issue of substantial administrative importance.

1. From its earliest decisions, this Court has recognized the common law action known as "money had and received" (*indebitatus assumpsit*), under which a plaintiff may recover money belonging to him that the defendant holds without lawful right.[3] See

[3] This cause of action exists whether the defendant has received the money directly from the plaintiff or through an intermediary or other third party. See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); *Bayne* v. *United States*, 93 U.S. 642, 643 (1877); *Galante* v. *Commodity Credit Corp.*, 71 F. Supp. 963, 966 (S.D. Cal. 1947). It is sufficient for the plaintiff to show that the money equitably belongs to him, even if it was paid to the defendant by another. *Bayne* v. *United States*, 93 U.S. at 643.

Elliott v. *Swartwout*, 35 U.S (10 Pet.) 137, 156-157 (1836); *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 265-266 (1839); *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866); *Dooley* v. *United States*, 182 U.S. 222, 228 (1901).[4] One of the earliest applications of this quasi-contractual claim for relief in this Court was to provide a judicial remedy for the recovery of unlawfully exacted taxes. See *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) at 156-157; *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.[5] The right of the United States to invoke this cause of action to recover taxes and other funds unlawfully held by the States or others arises under federal common law: "[n]o statute is necessary to authorize the United States to sue in such a case." *United States* v. *Wurts*, 303 U.S. 414, 415 (1938) (quoting *United States* v. *Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841)).

[4] See also *Moses* v. *Macpherlan*, 2 Burr. 1005, 1012, 96 Eng. Rep. 120, 120-121 (K.B. 1759); *United States* v. *Compagnie Generale Transatlantique*, 26 F.2d 195 (2d Cir. 1928).

[5] Although the action for money had and received is often based upon a mistaken or fraudulent payment (see, *e.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Bayne* v. *United States*, 93 U.S. at 643), the common law remedy is also applicable to "involuntary" tax payments made under "compulsion of law, or under protest, or with notice that [the plaintiff] intends to bring suit to test the validity of the [tax] claim." *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) at 731-732.

The court of appeals did not dispute (App., *infra*, 9a) that a cause of action for "money had and received" exists in favor of the United States. Instead, the court concluded that this federal cause of action is unavailing when the State provides a state-law refund procedure with which the United States has not complied. The court's reasoning is that, if the United States has not pursued available state-law refund procedures, the State's retention of unlawfully collected taxes does not represent "classic unjust enrichment" (App., *infra*, 14a-15a). The court therefore concluded that the federal remedy was inapplicable in these circumstances (*ibid.*).

This reasoning conflicts with the long line of decisions of this Court holding that, when the United States brings suit to recover unlawfully exacted State taxes, its rights are *not* circumscribed or limited by state procedures, state statutes of limitation, or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-351 (1939)).[6] See also *United States* v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960); *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). It is federal law, not state law, that provides procedures and rules of limitation for federal common law causes of action. See *Board of County Comm'rs*, 308 U.S. at 350-352. The federal cause of action for money had and received is based upon a contract "implie[d in law]" (*Bayne* v. *United States*, 93 U.S. at 643); it is therefore subject to the six-year statute of limitations set forth in 28 U.S.C. 2415(a) for claims "brought by the United States * * * upon any contract * * * implied in law" (*ibid.*). See *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d at 810. The federal claim is not subject to conflicting or additional state limitations or procedural requirements. *Ibid.*

[6] The 90-day suit commencement provision under state law (Cal. Rev. & Tax. Code § 6933 (West 1987)) does not purport to represent a "condition precedent" to the state-law refund action, as the district court erroneously concluded (App., infra, 17a). Instead, it purports to effect "a waiver of any demand against the state" in the event that the action is not commenced within "the time specified" (Cal. Rev. & Tax. Code § 6933 (West 1987)). The waiver effected by this provision is precisely the type of state-law restriction on federal recoveries that this Court, and the courts of appeals, have refused to allow. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351; *City of New Orleans* v. *United States*, 371 F.2d at 28.

Prior to the decision in this case, the courts of appeals consistently agreed with this conclusion. See *United States* v. *Broward County*, 901 F.2d at 1007-1009; *United States* v. *Michigan*, 851 F.2d at 810; *United States* v. *DeKalb County*, 729 F.2d at 741-742; *United States* v. *District of Columbia*, 669 F.2d at 741-742; *City of New Orleans* v. *United States*, 371 F.2d at 28. For example, in *Broward County*, the Eleventh Circuit held that the claim of the United States for recovery of state taxes paid by a federal contractor was not subject to the state-law requirement that suit be commenced within 60 days of certification of the state tax rolls. 901 F.2d at 1008. The court held (*id.* at 1008-1009):

> [T]he cause of action asserted by the government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action.

The Sixth Circuit expressed the same view in rejecting application of the state statute of limitations to a federal action for recovery of state taxes in *United States* v. *Michigan*, 851 F.2d at 810. Similarly, in *City of New Orleans* v. *United States*, in rejecting the State's argument that the United States was bound by state procedural restrictions in asserting the federal claim for recovery of taxes unlawfully assessed against a federal contractor, the Fifth Circuit observed that it was the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions." 371 F.2d at 28.

The court of appeals acknowledged that its decision in this case conflicts with the decision of the Eleventh Circuit in *Broward County*. The court simply concluded that *Broward County* was wrongly decided (App., *infra*, 14a) because there is no "classic unjust enrichment" when a state-created remedy is not pursued (*id.* at 14a-15a). This analysis turns the Supremacy Clause on its head. The existence of a state remedy cannot preempt a federal remedy for recovery of funds belonging to the United States. Prior to the decision in this case, no court had held that the United States must comply with varying state practices as a condition precedent to recovery of its property under the federal cause of action for money had and received. The focus of the action for money had and received is upon the existence, or lack, of lawful right of the defendant to hold the plaintiff's money; the State cannot rely upon state-created procedures to avoid an accounting under federal law for its unlawful possession of money belonging to the United States. Federal law creates, and governs, the right of the United States to recover its own funds.

See *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351.

The decision of the court of appeals would often leave the United States without an effective remedy to contest a tax improperly exacted from a federal contractor for which the United States ultimately is responsible. Many States, including California (Cal. Rev. & Tax. Code § 6932 (West 1987)), require that an administrative claim be presented prior to initiation of a state refund suit. These States often allow only the putative taxpayer, not third parties, to file an administrative refund claim and challenge a tax assessment by a statutory refund suit. See *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568 (1980). Other States condition any claim for refund on the requirement that the taxes be paid under protest. See *United States* v. *DeKalb County*, 729 F.2d at 741-742. Even if those States allowed the United States to protest the taxes imposed upon federal contractors, the United States often is not aware of the tax (or the legal issue involved) in sufficient time to participate effectively in the state administrative process. Protesting the payment and preparing and filing the state administrative claim for refund would, as a practical (and often legal) necessity, have to be done by the federal contractor in most instances.

If the state-law requirements for a state-created refund action were enforced upon the United States, the United States would thus often be effectively deprived of its right to challenge and obtain recovery of taxes unlawfully exacted by the States. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States, and to the diligence of fed-

eral contractors,[7] for enforcement of the government's claim for money had and received. Other courts of appeals have rejected the claim that the United States should be subjected to this manifest confusion, because it is the "usual principle that Federal law fashions remedies for recovery of funds or property of the United States" (*City of New Orleans* v. *United States*, 371 F.2d at 28).

2. The question presented in this case has substantial, recurring administrative importance. The case arises out of the relationship that exists between the United States and a private contractor under the standardized federal service contract used for the management of federally owned facilities. This standardized contract is used not only by the Department of Energy and other civilian departments but also by the armed services. It applies to numerous federal facilities, many of which are located in the Ninth Circuit where the present case arose. The state tax issues that emanate from these contracts often involve large sums of money and often lead to

[7] In *United States* v. *Anderson County*, 761 F.2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985), the United States was permitted to challenge a tax assessment against Union Carbide, a federal contractor. The Sixth Circuit held that Union Carbide had no beneficial interest or use in the Department of Energy's nuclear facility at Oak Ridge, Tennessee, which had been subjected to the Tennessee tax. The court noted that Union Carbide had contradicted the United States' claims by alleging in separate tax proceedings in California that Union Carbide had exclusive possession and use of the nuclear facility, but the court concluded that this statement by Union Carbide was not binding on the United States. The *Anderson County* case is an example of the difficulty that the United States would have in relying upon a federal contractor to protect the government's interest in state tax proceedings.

litigation. See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. 720 (1982); *United States* v. *City of Manassas*, 830 F.2d 530 (4th Cir. 1987), aff'd, 485 U.S. 1017 (1988); *United States* v. *Anderson County*, 705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983); *United States* v. *Washington*, 654 F.2d 570 (9th Cir. 1981), rev'd, 460 U.S. 536 (1983); *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981).[8] The decision of the court of appeals will lead to significant uncertainty in the protection of the rights of the United States to recover taxes unlawfully exacted by the States and will multiply the instances in which litigation is required to perfect the government's right to recover the large sums often at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

[8] The same question addressed in this case is also currently pending in the Eighth Circuit in *United States* v. *Duane Benton*, No. 91-2206 WMKC (argued on Jan. 9, 1992).

[9] In light of the previously consistent decisions of the courts of appeals on the issue presented in this case, and because the decision below allows state procedures to preempt the federal remedy in a manner inconsistent with *Board of County Comm'rs* v. *United States*, 308 U.S. at 351 ("state notions of laches and state statutes of limitations have no applicability to suits by the Government"), the Court may wish to consider summary reversal.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

JUNE 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-15833

D.C. No. CIV S-88-600 LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZTION, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
July 20, 1990—San Francisco, California

Filed May 16, 1991

Before: Arthur L. Alarcon and Cecil F. Poole,
Circuit Judges and Terry J. Hatter,* District Judge

---

* The Honorable Terry J. Hatter, Jr., United States District Court Judge for the Central District of California, sitting by designation.

OPINION

HATTER, District Judge:

FACTS

The United States, through the Departments of the Navy and Energy, contracted with Williams Brothers Egineering Company ["WBEC"] to manage oil drilling operations on federal land in California. California assessed WBEC $14 million in sales and use taxes for the years 1975 through 1981. The assessments were made pursuant to section 6384 of California's Revenue & Taxation Code, which imposes sales and use taxes against federal construction contractors. WBEC was informed of the assessments through notices of tax deficiencies issued in 1978 and 1982.

WBEC paid the assessments, under protest, with funds provided by the U.S., pursuant to their contract. A[f]ter each payment, WBEC, under the direction of the United States, pursued administrative claims through California Board of Equalization to obtain a refund of the taxes paid. After each administrative claim was denied, WBEC filed suit in state court. Both state court actions were dismissed, without prejudice, in January, 1988, when WBEC and California stipulated to a $3 million refund, based on erroneous assessments against personal property purchased by WBEC and used or installed by government personnel. The remaining $11 million represents the taxes assessed on personal property installed by subcontractors managed by WBEC.

In May, 1988, the U.S. filed suit in district court seeking declaratory relief establishing that California had erroneously classified and taxed WBEC as a construction contractor, as defined in California Sales

and Use Tax Reg. 1521, and that the taxed property was exempt. The United States sought a refund of the $11 million remaining, plus interest. Later, the United States argued that it was entitled to restitution based on a quasi-contract theory under federal common law. Finding that WBEC's failure to comply with California's statutory claim procedure precluded a cause of action for a tax refund, the district court granted California's motion for summary judgment in April, 1989.

The question is whether the district court erred in refusing to consider the quasi-contract claim, and in holding that, in this case, only California law provides a remedy for the over payment of California sales and use taxes.

STANDARD OF REVIEW

The standard of review for a grant of summary judgment is *de novo*. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338 (9th Cir. 1989).

SOVEREIGN IMMUNITY

Although an appellate court normally addresses only those issues resolved below, the court may, in its discretion, review an issue "conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed, . . . [or] when there are significant questions of general impact." *In Re Howell*, 731 F.2d 624, 626-27 (9th Cir.), *cert. denied*, 469 U.S. 933, 105 S. Ct. 330, 83 L. Ed. 2d 266 (1984) (citations omitted). Since issues of sovereign immunity pervade this case, we address them here.

The United States claims a right to a refund based on California's erroneous interpretations of its tax

laws. Other than asserting in its complaint that the action was brought "to vindicate the sovereign rights and pecuniary interests of the United States," the United States does not rely on any theories of sovereign immunity from the tax in question. Rather, the United States claims that, given the nature and terms of the contract, and WBEC's duties and responsibilities under it, California tax laws simply do not apply to WBEC. The United States does not claim that the tax in question is unconstitutionally discriminatory, or even unconstitutional as applied to WBEC. As the district court stated in its order granting summary judgment, the United States "does not raise a constitutional claim, and, other than its assertion that it brings this suit as a claim under federal common law, it does not tender any federal question."

However, the U.S. alludes to sovereign immunity in its arguments on appeal. Without actually invoking the phrase "sovereign immunity," and relying upon *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), the United States argues that when the federal government disburses funds, it is exercising a constitutional function, and that the right of the United States to a refund of an erroneous or illegal tax depends on its right to function free from improper state interference.

The Supreme Court has addressed the potential sovereign immunity issue raised by this case, and concluded that "the limits on the immunity doctrine are . . . as significant as the rule itself." *United States v. New Mexico*, 455 U.S. 720, 734, 102 S. Ct. 1373, 1382, 71 L. Ed. 2d 580, 591 (1981). In *New Mexico*, the Court held that state sales and use taxes could be constitutionally applied to federal management contractors. Such a tax is constitutional as long

as it is not imposed directly on the United States, or on a constituent part or instrumentality of the United States. *New Mexico*, 455 U.S. at 735, 102 S. Ct. at 1383, 71 L.Ed. 2d at 592. The Court found that the contractors in *New Mexico* were independent, and not constituent parts or instrumentalities of the United States. *New Mexico*, 455 U.S. at 738, 102 S. Ct. 1385, 71 L. Ed. 2d at 594.

Noting that it was "constitutionally irrelevant" that the United States reimbursed the contractor's expenditures, including tax liabilities, or that title to goods purchased by the contractors passed immediately to the United States, the *New Mexico* Court held that:

> [I]mmunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, even if the private entity is using the Government property to provide the United States with goods, or services. In such a situation the contractor's use of the property "in connection with commercial activities carried on for profit," is "a separate and distinct taxable activity." [I]mmunity cannot be conferred simply because the tax is paid with Government funds, [where] the contractor made expenditures under an advanced funding arrangement similiar to the one involved here.

New Mexico, 455 U.S. at 734-35, 102 S. Ct. at 1382-83, 71 L. Ed. 2d at 592 (citations omitted).

The contractual relationship between WBEC and the United States was, in essential respects, the same as the contractual relationships in *New Mexico*. WBEC functioned as an independent contractor operating and managing a federal facility under an advanced funding arrangement. Title to all its purchases immediately passed to the United States. The United States's efforts to characterize WBEC's role and responsibilities as limited do not make WBEC any more a constituent part or instrumentality of the United States than were the contractors in *New Mexico*. *See New Mexico*, 455 U.S. at 736-37, 102 S. Ct. at 1383-84, 71 L. Ed. 2d at 593-94. Moreover, we have previously found Cal. Rev. and T. Code § 6384 and Reg. 1521, as applied to a federal contractor, to be constitutional. *In re Howell*, 731 F.2d at 629. Therefore, the sovereign immunity of the United States from direct state taxation does not extend to WBEC and cannot be invoked by the United States in this case.

FEDERAL OR STATE LAW?

Lacking a colorable constitutional challenge, the United States must find a cause of action elsewhere, *i.e.*, California law or, as the United States argues, federal common law. The issue of whether state or federal law governs is a question of law and is reviewable do novo. *Cortese v. United States*, 782 F.2d 845, 849 (9th Cir. 1986). Precedent in the Ninth Circuit requires justification for the initial choice of federal law or state law in cases where no clear body of federal common law applies. *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980).

Where there is no clear body of applicable federal common law, state law must be applied unless a "sig-

nificant conflict between some federal policy or interest and the use of state law in the premises" is demonstrated. *State of California*, 655 F.2d at 917, quoting *Wallis*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L. Ed. 2d 369, 373 (1966). As discussed above, the United States enjoys no sovereign immunity in this case. Thus, the preliminary issues to be resolved in this case are constitutional: 1) whether there exists a federal interest in controlling the applicable law; 2) whether that federal interest conflicts with the state interest in preserving its control over local concerns; and 3); and whether the state law is hostile to a federal program. *See Industrial Indemnity Insurance Co. v. United States*, 757 F.2d 982, 985 (9th Cir. 1985).

A. No federal interest or program

In this case, no federal interest or program has been identified. However, relying upon *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), the United States argues that when the federal government disburse funds, it is exercising a constitutional function. However, *Independent School District No. 1* is distinguishable. In *Independent School District No. 1*, the United States brought an action to recover overpayments made to the Oklahoma School District under a community school lunch program. The Tenth Circuit reversed a district court judgment for defendants, holding that the federal government was entitled to recover the overpayments regardless of state procedural requirements. In the case at bar, the United States apparently implies that a federal interest is involved whenever the federal government disburses funds. However, it was undisputed in *Independent School District No. 1* that the

federal government had disbursed the funds for the school lunch program in its exercise of constitutional functions or powers. *See Independent School District No. 1*, 209 F.2d at 580. Because the school lunch program was a federal program, the disbursement was made "under the authority of federal law," and the United States had an interest in the success of that program that conflicted with the use of Oklahoma's law.

The present case involves no similar federal program, interest, or policy. It does not follow that every time the federal government disburses funds it does so under authority of federal law. The appellant confuses the act of disbursement with the underlying authority for the disbursement. The mere act of disbursing federal funds does not rise to the level of a federal interest. Here, the United States was not acting "under the authority of federal law" nor "in the exercise of a constitutional function," but instead was compelled by California law to disburse funds to pay state taxes. Since no federal program is involved, and since the disbursement of funds does not automatically give rise to a federal interest, there is no federal interest to conflict with the use of state law. *See United States v. State of California*, 655 F.2d 914 (9th Cir. 1980).

B. No applicable federal common law

The next issue is whether there is a clear body of applicable federal common law. The law which the United States seeks to have applied to this case—a federal common law quasi-contrast theory action for money had and received—is not clear.

Unjust enrichment

The cases cited by the United States to support its argument that it may maintain a quasi-contract action independent of state law involved classic cases of unjust enrichment. *See, e.g., United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (refund sought for portion of federal workman's compensation benefits paid for which defendant had received double recovery); *United States v. DeKalb County*, 729 F.2d 738, 740 (11th Cir. 1984) (U.S. mistakenly paid double assessments on the same property); *City of New Orleans v. United States*, 371 F.2d 21, 29 (5th Cir.), *cert. denied*, 387 U.S. 944, 87 S. Ct. 2076, 18 L. Ed. 2d 1330, *reh. denied*, 389 U.S. 890, 88 S. Ct. 19, 19 L. Ed. 2d 201 (1967) (state law manipulation amounting to a "procedural trap" resulted in deprivation of a chance for the federal government to pursue it remedies before state time limitations had run.)

At the heart of an action based on quasi-contract lies a claim of unjust enrichment and such quasi-contract liability is dictated by the needs of justice and fairness. *United States v. Neidorf*, 522 F.2d 916, 918-19 and n.5 (9th Cir. 1975), *cert. denied. Neidorf v. United States*, 423 U.S. 1087, 96 S. Ct. 878, 47 L. Ed. 2d 97 (1976); *see also United States v. Limbs*, 524 F.2d at 801. No such facts exist in this case.

WBEC, backed throughout by the United States, had a fair chance to argue against the validity of the assessments in the adminstrative and state court proceedings. This case does not involve classic unjust enrichment such as simple overpayment. Instead, the United States's unjust enrichment argument is posited upon the interpretation of a state-created exemption from a state created sales tax. Thus, as will be discussed below, compliance with state law claim filing

procedures is a condition precedent to the filing of an action. Moreover, the United States's federal common law argument is undermined by the fact that the United States seeks declaratory relief based entirely on the interpretation of California tax regulations. The district court did not err in denying equitable relief when it found that the facts of this case "simply do not give rise to a claim of 'unjust enrichment' sufficient to invoke the doctrine of quasi-contract." Record at 23.

C. 28 U.S.C. § 2415 and the quasi-contract claim

Initially, the United States brought this action for declaratory relief, essentially, for a refund of monies paid to WBEC for the tax assessment. At a certain point after the commencement of the litigation, the United States changed its argument to a claim for a refund based on quasi-contract. This quasi-contract theory would allow the United States to take advantage of a six-year statute of limitations under 28 U.S.C. § 2415.

However, 28 U.S.C. § 2415 does not permit the United States to bring a quasi-contract claim because section 2415 does not provide a cause of action. It merely provides for a six year time period during which the United States *may* sue under quasi-contract. We have held that the United States is not subject to state statutes of limitations when it seeks to assert an *otherwise valid* cause of action, the United States "must have become entitled to a claim and have acquired a cause of action before it comes under the umbrella of 28 U.S.C. § 2415." *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17, 19 (9th Cir.), *cert. denied* 409 U.S. 979, 93 S. Ct. 308, 34 L. Ed 243 (1972) (failure to bring suit within California statutory time limit vitiated claim). Because of its failure to comply with California's claim filing requirements, the United States has not become entitled to a claim. Thus, section 2415 does not apply.

The United States points out that the Supremacy Clause and policies protecting the federal treasury provide the United States with litigation advantages over other plaintiffs in enforcing its rights, such as freedom from state statutes of limitations and from the defense of laches. Although sovereign immunity normally exempts the United States from state statutes of limitations, *United States v. John Hancock Mutual Ins. Co.*, 364 U.S. 301, 308, 81 S. Ct. 1, 5 L. Ed. 2d 1 (1960), when a claim procedure is a condition precedent to, or an integral element of a state-created cause of action, the United States is not exempt from the time bar, even if a federal statute of limitations may otherwise apply. *State of California*, 655 F.2d 914, 918 (9th Cir. 1980).

In the case at bar, the district court correctly found that the United States had no cause of action for a tax refund since it lacked an element necessary to the accrual of the cause—the United States failed to file suit within 90 days of the Board of Equalization's denial of WBEC's refund claim, as required by Cal. Rev. & T. Code § 6933. Although WBEC *did* file state court actions within 90 days of each adverse decision by the Board of Equalization, those actions were later dismissed without prejudice, the legal effect of such dismissal is as though the actions had never been filed. *See Nolan v. Workers' Compensation Appeals Board*, 70 Cal. App. 3d 122, 128-29, 138 Cal. Rptr. 561, 564 (1977). We have, previously, recognized the effect of a dismissal without prejudice. *See Humphreys v. United States*, 272 F.2d 411 (9th Cir.

1959) (after widow voluntarily dismissed without prejudice, a Federal Tort Claims Act suit was brought on account of husband's death, and widow was denied reinstatement because statute of limitations had, by then, run). Thus, the 90-day periods following each administrative denial *effectively* ran without suit being filed, precluding a state cause of action for a refund.

Although California courts have not characterized the 90-day limit of section 6933 as a condition precedent to the accrual of a cause of action, the failure to comply with the 90-day limit has been held to bar suit. *Pacific Gas & Electric v. State Board of Equalization*, 134 Cal. App. 2d 149, 285 P.2d 305 (1955), *app. dismissed*, 350 U.S. 979, 76 S. Ct. 468, 100 L. Ed. 848 (1956). Moreover, California courts have held similar limitations to be conditions precedent to, or essential elements of, other causes of action. *See State of California*, 655 F.2d at 918, *United States v. Hartford Accident and Indemnity Co.*, 460 F.2d at 19. Since federal statutes of limitations become determinative only after the government acquires a cause of action, and since the United States never acquired a cause of action, 28 U.S.C. § 2415 does not apply. *See State of California*, 655 F.2d 914 (9th Cir. 1980). Thus, the precedent relied on by the district court amply supports its ruling that compliance with the 90-day limit is an element of the cause of action for a tax refund. *State of California*, 655 F.2d at 918-19.

Recently, in a case that is factually similar to the case at bar, the Eleventh Circuit reversed a summary judgment in favor of Broward County and held that the United States's claim for a refund of tax payments sounded in quasi-contract. *United States v. Broward County*, 901 F.2d 1005 (11th Cir. 1990).

The Eleventh Circuit held that the United States was not subject to the Florida 60-day claim filing deadline in spite of the fact that the Florida statute also created the right to contest the assessment. Argument to the contrary "presupposes that the United States must look to the state law for the creation of its cause of action. The cause of action asserted by the federal government is not a state law judicial remedy or cause of action but is a federal common law cause of action in quasi-contract for money had and received. In these circumstances the state statute has no application to this action." *Broward County*, 901 F.2d at 1008-9.

The Eleventh Circuit gave no reason for its conclusion and attempted to disinguish *State of California*, on the ground that *State of California* involved a state cause of action rather than the federal quasi-contract cause of action. The only federal common law relied upon by the Eleventh Circuit was the common law action for money had and received. As discussed above, the common law action for money had and received is not applicable in this case. Just as there was no unjust enrichment in *State of California*, there was none in *Broward County*, and there is none in the case at bar.

Furthermore, compliance with state claim filing procedures was a condition precedent to the filing of a court action in *State of California*. The Ninth Circuit found that the use of California's claim filing law would not infringe upon any federal interest and rejected the federal government's arguments that unique federal interests were indicated in 28 U.S.C. § 2415(b), the federal statute of limitations. "We find no indication in the legislative history of that statute . . . *of any federal policy or program* which

would be frustrated by requiring compliance with California's more restrictive time requirements." *State of California*, 655 F.2d at 919 (emphasis added). The same condition precedent was present in *Broward County*. However, the Eleventh Circuit chose not to apply state law without explanation.

An analysis of *Broward County* under the Ninth Circuit's approach would have yielded a different holding. There was no conflict between any federal interest and the use of state law. The federal government had no interest, program, or policy that would have been compromised or frustrated by the use of Florida's claim filing procedure. Furthermore, the law suit filing deadline would have created no difficulty for the federal government beyond encouraging efficiency and speed in the preparation of claims and litigation. *See State of California*. Had the Eleventh Circuit applied the Ninth Circuit's approach in *Broward County*, the Florida statute would have been applied.

D. CONCLUSION

The United States's allusions to sovereign immunity are unfounded, and no federal interests or programs have been identified that would conflict with the use of California's tax laws. Furthermore, there has been no showing of classic unjust enrichment that would justify the use of a federal common law claim for money had and received. The United States does not claim, and the district court did not find, any unfairness in the state administrative or judicial proceedings. Since there is no applicable federal common law and no conflict between federal policy and the use of the California tax law in this case, state law must be applied. As in *State of California*, the

United States has failed to meet the claim filing requirements and, therefore, has not stated a cause of action.

This case comes down to a tactical mistake. In directing WBEC to accept the settlement and dismiss the action without prejudice, the United States apparenty did not appreciate fully the implications of its actions under California's statutory tax refund claim procedures. However, this mistake does not, of itself, warrant equitable relief. The United States had its day in court. Equity does not now demand that the United States be given a second opportunity to prove that the tax assessment was erroneous.

We affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-88-600 LKK/EM

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

ORDER

[Filed Apr. 25, 1989]

The United States brings this suit for declaratory judgment and refund of taxes. At issue is $14,136,853.43 in sales and use tax paid to the state prior to 1982 by the United States for its contractor, Williams Brothers Engineering Company (WBEC). The Government claims that state law did not authorize collection of these taxes because WBEC was not contractually responsible for the installation of the property it purchased, and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2). Given this claim, the Government argues that the property was merely for resale and not subject to sales tax. Alternatively, plaintiff argues that many of the purchases were exempt because they were not fixtures, which, under Cal. Reg. 1521(b) are nontaxable sales for resale.

Plaintiff does not raise a constitutional claim, and other than its assertion that it brings this suit as a claim under federal common law, it does not tender any federal question.

Both parties have moved for summary judgment. Defendants submit, in part, that this action is time-barred. Because I believe that defendants' position is dispositive, I turn to the question of whether this suit is timely brought.

Because of sovereign immunity principles, the United States is generally not subject to statutes of limitation. *See United States v. John Hancock Mutual Insurance Co.*, 364 U.S. 301, 308 (1960). There are two exceptions. First, a state-created cause of action which integrates a claim procedure can time-bar the federal government. *United States v. State of California*, 655 F.2d 914 (9th Cir. 1980). Second, Congress may expressly limit the federal government's time to file suit, or it may waive federal immunity to state statutes of limitation. As I explain below, it appears to the court that the first exception applies to the matter at bar.

The Ninth Circuit has held that a California statute "which provides a time limitation as an element of a cause of action or as a condition precedent to libility applies to suits by the United States even if there is an otherwise applicable federal statute of limitations." *Id.* at 918-19, *citing Willis v. Reddin*, 418 F.2d 702, 704 (1969). ("In California statutes or ordinances which condition the right to sue the sovereign upon timely filing of claims and actions are more than procedural requirements. They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action.") The court explained that although the United States may sue the state in federal court

> [L]ike any other plaintiff, the federal government must first have a cause of action against the state. [California's claim filing] requirements are substantive elements of the cause of action, not mere jurisdictional limitations. . . .
>
> The federal government, like any other plaintiff, must meet all elements of any applicable cause of action—the bitter as well as the sweet.

655 F.2d at 918-19. *See also United States v. Hartford Accident and Indemnity Co.*, 460 F.2d 17, 19 (9th Cir. 1972).

In *United States v. California* the court found that California had integrated its claim-filing provisions into the statutory right to recover against the state. Because the United States had not complied with the state's claim-filing provisions, it was time-barred from filing suit.[1] As I now explain, these principles apply directly to the suit before the court.

By statute, California has provided a right to seek tax refunds contingent on a claim procedure. Cal. Rev. and Tax. Code § 6901 provides a right for refund for sales taxes improperly collected. Section 6902 provides that no refund shall be approved by the board unless a claim is timely filed. Sections 6932 and 6933 allow suit to be brought only after an administrative claim is denied.[2] Section 6933 provides:

---

[1] *Compare United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975) (six-year federal limitations period applies where restitution sought on federal grounds with no applicable state statute).

[2] Although the state statute permits suit in state court, its provisions cannot bar the United States from suing for a refund in federal court. *See United States v. California*, 655 F.2d at 918-19.

> Within 90 days after the mailing of the board's action upon a claim filed pursuant to Article 1 (commencing with Section 6901), the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> *Failure to bring action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.*

Cal. Rev. and Tax. Code § 6933 (emphasis added).

There can be no doubt that, pursuant to this statutory scheme, the timely filing of a state court action is a condition precedent to liability. In other words, there is no such thing as a right to refund unless refund procedures are followed.[3]

It is undisputed that WBEC, at plaintiff's direction, filed a timely claim and then a timely lawsuit. It is also undisputed that, having won a partial settlement, WBEC voluntarily dismissed the state court action without prejudice. When an action is dismissed without prejudice, it is as though it were never filed. *See* Witkin, *California Procedure*, Volume 6, § 81. The 90 days in which to file suit have long since passed. Thus, pursuant to state law and applying the prin-

---

[3] For this reason, plaintiff's argument that it brings this action under principles of federal common law cannot be entertained. Given this observation, the court will resist the temptation to examine the complex issues relating to whether notions of federal common law would otherwise apply under the circumstances of this case.

ciples of *U.S. v. California, supra,* plaintiff has waived its demand for overpayment.

Plaintiff argues that 28 U.S.C. § 2415(a) applies to the instant case. This argument must be rejected. As I noted above, where a state claim statute applies as an element of a cause of action, it applies to suits of the United States "even if there is an otherwise applicable federal statute of limitations." *U.S. v. California*, 655 F.2d at 918-19. Indeed, plaintiff's argument is no more than an assertion that although it relies on California's substantive law, its claim is founded on principles of federal common law. Since, as I have explained above, no claim exists unless founded upon California's statute, the Government's argument must be rejected.

Indeed, even if the Government's argument was tenable, it would not apply under the circumstances of this case. For the federal statute to apply, plaintiff's claim for a tax refund must be characterized as sounding in tort, contract or quasi-contract. *United States v. Limbs*, 524 F.2d 799 (9th Cir. 1975). As I explain below, such a characterization of the instant suit is inappropriate.

In the case at bar, the United States chose to finance its contractor's tax bill. It then directed its contractor through state court litigation which resulted in limited success. It now seeks to utilize a favorable statute of limitations in order to litigate its claim relative to a proper interpretation of state law on its own behalf. As I explain below, these facts simply do not give rise to a claim of "unjust enrichment" sufficient to invoke the doctrine of quasi-contract.

It is true that in another context this circuit's court has noted that the wording of § 2415(a) "'is in-

tended to include quasi-contracts involving unjust enrichment wherein the debtor receives money from the Government to which he is not entitled, regardless of whether the payment is made pursuant to agreement or as a gratuity.'" *Limbs* at 803 n.3, *quoting Hearings on H.R. 13652 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 7 (1966). This broad restatement of the definition of quasi-contract does not resolve the question of whether the definition of "quasi-contract" can be stretched to include state taxes under a disputed state statute. Again, I note that plaintiff argues that defendant is not entitled to the money because, under state law, plaintiff deserves a refund. Thus, the claimed entitlement depends on an interpretation of state law. Under such circumstances, there is simply no "unjust enrichment" within the traditional meaning of the phrase, such as existed in *Limbs* itself, where a plaintiff receives double recovery.

While the Ninth Circuit has not addressed the issue, several other circuits have held, under a variety of circumstances, that the federal government's claim for a state tax refund sounds in quasi-contract. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988); *United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); *City of New Orleans v. United States*, 371 F.2d 21, 23 (5th Cir. 1967); *U.S. v. Compagnie Generale Transatlantique*, 26 F.2d 195 (2d Cir. 1928). Although those courts have found a quasi-contractual right to a refund when the United States is a plaintiff, that characterization is not made when individual citizens sue. *See Shelter Island and Greenport Ferry Co. v. United States*, 246 F. Supp. 488 (E.D. N.Y. 1965); *Sea Products, Inc. v. United States*, 578 F. Supp. 1485 (W.D. Wash. 1983).

The Ninth Circuit has observed that the federal statute of limitations was enacted in "order to place actions by the United States on an equal footing with those by private litigants." *Limbs*, 524 F.2d at 801 (citing legislative history). By characterizing the Government's action as "quasi-contract" under circumstances where a private litigant's action would not be so characterized, the Government achieves an extra three years to file suit. Such a result directly contradicts the Ninth Circuit's interpretation of congressional purpose.

The equities of the instant action, moreover, are considerably less compelling than in those cases in which an action in quasi-contract was allowed. For instance, in *City of New Orleans*, *supra*, the defendants' "sleight of hand" was said to have effectively foreclosed either the subcontractor or the Government from invoking a state claim for refund. The court found that "[a]gainst the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received." 387 F.2d at 28. There is no suggestion in the record before me that the state administrative or court proceedings were less than fair. Perhaps if state law had been manipulated, as in *New Orleans*, to cheat the Government from a chance of pursuing its remedies, common law notions of "unjust enrichment" might take this case out from under the doctrine of *United States v. California*. Here, however, the Government seeks no more than to relitigate its contractor's entitlement to the "sale for resale" exclusion, *i.e.*, a state-created exemption from a state-created sales tax regulation. Without the exclusion, neither WBEC nor the United States would

have a claim to "unjust enrichment." The alleged "unjustness" would not exist if the state had not created an exception to its tax. There is no alleged unjustness in the state procedures.

In sum, the Ninth Circuit has not characterized tax refund claims as quasi-contractual; it has, however, found California claim procedures similar to those at bar to be integral to a cause of action. Since the Government sues pursuant to California law, its failure to comply with the state procedures bars this claim. Although WBEC filed a timely claim and then a lawsuit, even if this were sufficient to preserve the United States' rights, the dismissal without prejudice rendered that suit null and void. Thus, the 90 days have passed in which either party could file its suit. Accordingly, this suit is time-barred.

In light of the above, IT IS HEREBY ORDERED that defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: April 24, 1989.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15833

D.C. No. CIV S-88-600-LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

ORDER

[Filed Mar. 18, 1992]

Before: ALARCON and POOLE, Circuit Judges, and HATTER,* District Judge

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Poole have voted to reject the suggestion for a rehearing en banc. Judge Hatter would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-15833

CT/AG#: CV-88-0600-LKK

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA; CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of California (Sacramento)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 5/16/91.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case Number: CIV S 88-600 LKK

UNITED STATES OF AMERICA

v.

STATE OF CALIFORNIA, ET AL.

Judgment in a Civil Case

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IS HEREBY ENTERED PURSUANT TO THE COURT'S ORDER OF 4-25-89, GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

ACCORDINGLY, THIS ACTION IS ADMINISTRATIVELY CLOSED.

[Entered 4-25-89]

Date April 25, 1989

JAMES R. GRINDSTAFF
Clerk

/s/ C. A. Ward
(By) Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45431